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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. ~~1166~~ 78

UNITED STATES OF AMERICA,
Petitioner,

vs.

VICTOR N. MILLER, also known as Vic Miller; JOHN J. HUMPHREY, also known as John J. Humphrey, Sr., also known as J. M. Humphrey; CHARLES J. McCONNELL, also known as Chas. J. McConnell; ELMER JOHNSON and HILMA JOHNSON, his wife; DAVID WILSON AGNEW, ALBERT ROUGE and FLORENCE VAN SANTEN,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The judgment of the Circuit Court of Appeals for the Ninth Circuit, which petitioner seeks to review, reverses a judgment of the District Court for the

Northern District of California in a proceeding in eminent domain. It was an ordinary action in eminent domain, filed by the Government through the Secretary of the Interior to acquire several parcels of land for the relocation of a railroad, made necessary through the construction of the Shasta Dam, a feature of the Central Valley Project, and, as the issues were framed, the case presented no unusual or important questions of law or fact. The questions which counsel for petitioner now asserts to be of such national importance as to warrant the granting of certiorari by this Court, have resulted from the conduct of the case in the District Court by counsel for the Government.

The judgment of the District Court, in fixing the awards of compensation made to the several landowners, was based upon the verdict of the jury. By this verdict absurdly low verdicts were returned, the findings of the jury being apparently predicated upon the rulings of the District Judge.

For the parcels of land affected by this appeal the awards made by the verdict and judgment are set forth in the footnote.[1]

[1] Parcel No. 1. (a) Albert Rouge; value of land taken $50.00; severance damage, nil;

(b) Miller, Humphrey and Kronschnabel, value of land taken $160.00; severance damage, $75.00;

(c) Florence Van Santen, value of land taken, $10.00; severance damage, nil.

Parcel No. 4. (a) Elmer Johnson and Hilma Johnson, value of land taken, $125.00; severance damage, $120.00.

Parcel No. 6. (a) David Wilson Agnew, value of land taken, $15.00; severance damage, nil.

Parcel No. 7. (a) McConnell, Miller and Humphrey, value of land taken, $500.00; severance damage, $100.00.

By its judgment the District Court, in addition to awarding compensation for the lands taken, awarded judgment to the Government against three of the respondent landowners, Miller, Humphrey and McConnell, for the sum of $650.00 each, this being the amount in excess of the verdict which had been deposited in Court with the declaration of taking, when title to their land was taken, and paid to said respondents under an order of the District Court.

In awarding such a judgment against said respondents, the Court outside of the issues, made the award without process or notice to said landowners, nor was any proceeding taken in the District Court to vacate the order under which the money had properly been paid to respondents.

By the decision of the Circuit Court of Appeals, the judgment of the District Court was reversed,

First, for the reason that said judgment is not, nor is the verdict of the jury upon which it is based, supported by any proof showing the value of the property condemned at the date of taking; under the rulings of the District Court the respondents were deprived of a trial of that issue;

Second, the District Court erred in summarily awarding a judgment, outside of the issues, in favor of the Government and against respondents Miller, Humphrey and McConnell, for the sum of $650.00 each.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT ON THE PROPER MEASURE OF COMPENSATION:

This Honorable Court has uniformly held that the value at the time of taking is the measure of the compensation to which the land owner is entitled when property is taken by the Federal Government in eminent domain.

United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 1063;

United States v. Rogers, 255 U. S. 163, 65 L. ed. 566;

Olson v. United States, 292 U. S. 246, 78 L. ed. 1236;

Danforth v. United States, 308 U. S. 271, 84 L. ed. 240.

In cases of inverse condemnation the property owner is entitled to compensation fixed by the same rule.

Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083;

United States v. Klamath etc. Indians, 304 U. S. 119, 82 L. ed. 1219;

Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142.

In the *Phelps* case, supra, the Court said that the landowners "are entitled to have the full equivalent of the value of such use at the time of taking paid contemporaneously with the taking".

In the *Olson* case this Court said:

> "That equivalent is the market value of the property at the time of taking contemporaneously paid in money."

In the decision of the case of *United States v. Klamath and other Tribes*, 304 U. S. 119, 82 L. ed. 1219, the Court said:

> "The established rule is that the taking of property by the United States in the exercise of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

It is significant that all of the foregoing decisions of this Court have been rendered since the decision in the case of *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, and yet in none of said cases has said *Shoemaker* case been cited or construed as supporting the contention advanced by appellee in the Court below in respect to the form or substance of the proof of value and damages that is admissible in actions where land is condemned for a federal project.

It is fair to say, we believe, that the question which counsel for petitioner here attempts to clothe with grave importance is really an old and settled question introduced in a new and somewhat fantastic guise, that question being,

> What consideration is to be given to the *general benefits* which result from a public improvement in fixing the compensation and damages that must be paid to a landowner whose property is taken for such improvement by proceedings in eminent domain?

Considering the question from this aspect, we believe the fallacy of the argument that "the govern-

ment must not be required to pay for something it has itself made" becomes manifest. It is the equivalent of saying that the value of general benefits, common to the community, should be deducted in fixing the damages payable to the landowner for property taken in eminent domain; and this is contrary to the accepted rule.

General benefits have been defined as being "an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement." (*Beveridge v. Lewis*, 137 Cal. 619, 623, 70 Pac. 1083.)

The general benefits that result from the construction of a public improvement are the natural result of the creation of said improvement by the condemnor, whether it be the Government, a municipal corporation, or a public utility. They are "conjectural and incapable of estimation". (Id. 137 Cal. 624.)

If it had been announced in 1937 that the Central Pacific Railway Company, instead of the Government, was going to construct a line of railroad through the area involved in this case, and later, in December, 1938, said company had filed a suit to condemn a right of way for said railroad, could the railroad company contend that in fixing the compensation payable to the landowner for the right of way, there would have to be excluded the amount of any increase in the value of the property due to the announcement of the project in 1937? The answer to this question, manifestly, must be in the negative.

Does not the constitutional guarantee of just compensation, i.e., value at the time of taking, apply in all cases with equal effect, whether condemnation be sought by the Government or by a private corporation engaged in a public use?

This subject of benefits, as related to eminent domain, is given very exhaustive consideration in the opinion of this Court in the case of *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270.

It is now the general rule that there should be no deduction for general benefits from the damages recoverable in condemnation.

Beveridge v. Lewis, 137 Cal. 618, 70 Pac. 1083;
Los Angeles v. Marblehead L. Co., 95 C. A. 602, 273 Pac. 131;
United States v. Alcorn, 80 Fed. (2d) 487;
Board of Levee Inspectors v. Crittenden, C. C. A., 94 Fed. 613-617;
18 *Am. Jur.* 944, Sec. 299;
29 *C. J.*, Sec. 1064.

In *Bauman v. Ross*, supra (167 U. S. 548, 42 L. ed. 270), this Court quotes with approval from a decision of the late Justice Brewer, written when he was a member of the Supreme Court of Kansas. (167 U. S. at page 581, 42 L. ed. at page 285.) After declaring that direct benefits to the owner of private property taken for public use were to be considered a part of the compensation he receives, Justice Brewer said:

"We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the

public; for he pays in taxation for his share of such general benefits."

When the District Court in the present case required the respondents to exclude from their valuation evidence "any increase in the value of the property due to the Central Valley Project", and permitted the Government's witnesses to eliminate said element in giving their testimony on value, the obvious effect of the ruling was to charge general benefits against the compensation to be recovered by the landowner.

This was error, and the judgment of the District Court has properly been reversed by the Circuit Court of Appeals.

As a matter of fact, the proper procedure for the consideration of benefits in a case of this kind, is now governed by statute. (U. S. C. A. Title 33, Sec. 595.)[2]

The Congress, in making express provision in said Act for the offset of any "special and direct benefits", very clearly indicates that it was not intended

[2] "*Consideration of Benefits in Assessing Compensation.* In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken, or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement and shall render their award or verdict accordingly."

that general benefits were to be considered by way of reducing the compensation to be awarded. (*United States v. Alcorn*, 80 F. (2d) 487.)[3]

THE CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE ACTION OF THE DISTRICT COURT IN SUMMARILY ENTERING JUDGMENT IN FAVOR OF PETITIONER AND AGAINST CERTAIN RESPONDENTS FOR THE AMOUNT OF MONEY PAID TO SAID RESPONDENTS IN EXCESS OF THE VERDICT WAS UNAUTHORIZED AND VOID.

On this feature of the case there can be no doubt that the decision of the Circuit Court of Appeals is correct,

First, from the standpoint of procedure; and

Second, as a matter of statutory interpretation.

The circumstances which are urged by the Solicitor General as being of sufficient importance to justify a review of this feature of the decision by certiorari are matters which should be addressed to the Congress, if the public interest requires an amendment of the Declaration of Taking Act.

It is undisputed that the award in favor of the United States, plaintiff below, and against the respondents Miller, Humphrey and McConnell, for the recovery of $650.00 from each of said respondents,

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[3]The opinion in said case discloses that the government there made substantially the same contention as it has made here. "The government contends that the increase in value of the property due to the announcement of the Bonneville Project should be deducted from the amount of the award, and that the rulings and instructions of the court to the jury, and the rejection of the government's evidence and instructions on that subject were erroneous." (From Opinion p. 488.)

was not within the issues raised by the pleadings in the case, and was incorporated in the judgment by the District Judge without process, and without notice to the parties.

A decree, in so far as it undertakes to decide issues not made by the pleadings, is *coram non judice* and void.

Osage Oil etc. Co. v. Continental Oil Co., 34 F. (2d) 585;
Baer v. Smith, 201 Cal. 87, 99, 255 P. 827;
Kelley v. Benton (C.C.A. 9th), 179 F. 466;
U. S. Nat. Bank of L. A. v. Jones, 24 C. A. 514, 141 P. 1073.

A PROPER INTERPRETATION OF THE STATUTE SUSTAINS THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The following phrases of the Declaration of Taking Act, which is printed as an appendix to the petition herein, negative any implication that the Government is entitled to judgment against a landowner for the return of the money deposited in the registry of the Court and withdrawn by the landowner in pursuance of the Act, viz.:

(a) The deposit in the Court is made "to the use of the persons entitled thereto";

(b) Upon the filing of the declaration of taking and such deposit in the Court, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said

declaration, shall vest in the United States of America";

(c) "Interest shall not be allowed on so much" (of the final award) "as shall have been paid into the court";

(d) "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith *for or on account* of the just compensation to be awarded in said proceeding";

(e) In case the compensation finally awarded "*shall exceed* the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency". (Italics ours.)

The statute having expressly authorized payment of the whole deposit to respondents, without any condition attached, we submit that they are entitled to retain same. Had it been the intention of the Congress to provide for the recapture of said payment, such a condition would have been definitely expressed and incorporated in the Act, for it cannot be supplied by implication in view of the other provisions of the statute and the necessity of interpreting same in the light of the Fifth Amendment.

Implicit in the statute, in view of the foregoing provisions of the Act and the Fifth Amendment, is the intention of Congress that when the Government exercises its right under the statute to take property for public use in advance of judgment, the landowner

shall be entitled to the amount of money that is deposited in the Court; to have and use it immediately, if he so desires, and to recover any deficiency, with interest, if the final award exceeds the amount he has received.

Clearly, the phrase, "for or on account of" the just compensation to be awarded in said proceeding must be construed according to the ordinary and accepted meaning of such words; the word "for" would thus be construed to mean "in payment of", and the words "on account of" as meaning in "part payment of" the just compensation to be awarded.

Additional support for the above construction of the Act is found in the circumstance that the statute omits entirely to make any provision for any contingency in which the amount ultimately awarded might be less than the amount deposited and received by the former owner according to the Government's valuation, whereas, the statute expressly provides for the case of an award in excess of the amount received by the former landowner.

Under the familiar principle of *expressio unius exclusio alterius*, it seems clear that Congress did not intend that the compensation finally to be received by the landowner, when his property was taken in advance, should ever be less than the amount of the deposit.

The deposit in Court being "to the use" of the persons entitled thereto, and interest on said sum being thereafter denied to the landowner, irrespective

of the amount of the final award, the logical and valid interpretation of the Act is that the amount of the deposit in Court, being the Government's valuation of the land at the time of taking, is intended to be a contemporaneous and unconditional payment in that sum on account of just compensation for the land, the same to vest in the landowner as his property at the time when the title vests in the United States.

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, Redding, California,
May 18, 1942.

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